No. 2886

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

VINEYARD LAND AND STOCK COMPANY, a Corporation, *Appellants*,

vs.

TWIN FALLS-OAKLEY LAND AND WATER COMPANY, a Corporation, and OAKLEY CANAL COMPANY, a Corporation, *Appellees*.

BRIEF OF APPELLEES

SAMUEL H. HAYS,
P. B. CARTER,
Solicitors for Appellees.

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STATEMENT.

This suit involves the right to the use of water from Goose Creek in Idaho and Nevada. This stream heads in Idaho fifteen or twenty miles to the north of the southern boundary of the State; flows thence southward into Nevada a distance of eight or ten miles; thence turns eastward and to the north touching the northwest corner of Utah, and thence north into Idaho emptying into Snake River forty miles or more north of the State line.

The property of the appellants is situated in Nevada and the water claimed by them is diverted

and used in that State. Along the headwaters of the stream in Nevada are a succession of small valleys where the land holdings of appellants are located. These holdings comprise a number of old time cattle ranches (pp. 100, 136, 124) which are still chiefly used for stock raising purposes.

Farther north in Idaho, the stream emerges from the mountains and the valley then spreads out in the shape of a fan until it reaches Snake River. On this fan-shaped area, the irrigation project of the appellees is situated. The property of the appellees is in Idaho and the water claimed by them is diverted and used in that State. The lands in Idaho were originally taken up and held by individual farmers who built individual or community ditches for the purpose of irrigating their lands. (pp. 82-87.) Later on, by purchase, some of the water rights at the northern end of the valley were consolidated with those at the southern or upper end in order to give a better water service. (p. 86.) Still later on, the settlers induced the Twin Falls-Oakley Land & Water Company to construct an irrigation project covering their lands and additional government lands, the project being built under the terms of what is known as the Carey Act (pp. 67, 231.)

The valley had been settled, beginning with 1875. Settlement and cultivation had proceeded until in 1888, 12,000 acres of land had been patented to the settlers and 6.500 acres were irrigated (pp. 73, 87), this being apparently the limit of land which could

be successfully irrigated by means of the existing water supply. Ditches had already been built at that date for the utilization of the entire water supply. (pp. 82, 87.) Conditions in the valley changed little from 1888 to 1909. (pp. 87, 88, 89.) In the meantime, these settlers had obtained two water right decrees upon the stream, one in 1887 (pp. 259, 77), and the other in 1892 (pp. 268, 77.) To these suits the water users in Idaho were parties. The Nevada users were not made parties.

In 1909, the settlers desiring to secure the benefits of a modern irrigation system and also desiring to have more land irrigated in their valley, negotiated with the Twin Falls-Oakley Land & Water Company for the construction of a Carey Act irrigation project (p. 73); this project to be made up of the 12,000 acres of land held by the settlers and upwards of 43,000 acres of land (pp. 23, 24, 231) belonging to the government. The project was presented by the Oakley Company to the State Board of Land Commissioners of the State of Idaho, was approved by that Board, was afterwards approved by the Department of the Interior and the works completed in the year 1913, and water turned onto the lands. (p. 70.)

The flow of the stream is small in July, being only 54.3 acre feet or 2,715 inches. In the early part of the season, in the months of March, April, May and June, the flow is considerably greater (p. 99), amounting in the month of May on the average to

202.3 second feet or 10,115 inches. Irrigation would normally commence on this project in the latter part of May or the first of June, but owing to the nature of the flow of the stream, it became necessary for the settlers to turn on the water at a very early period in order to saturate their lands and in this way to use the land as a sort of reservoir for the crops afterwards to be planted. (pp. 189, 196.) To these early day settlers water was distributed under the decrees at the rate of one inch to the acre. (p. 164.) Owing to the fact that the high flow of the stream occurred so early in the season, the settlers were of the opinion that a reservoir system might be established which would better serve their purposes and which would irrigate a large body of land. It was this view which induced them to cooperate with the Oakley Company for the building of the Oakley Project. Upon the building of the project the old settlers conveyed all of their rights to the Oakley Company and took back water contracts from that company providing for their water supply (pp. 69, 247). The Oakley Company, in addition to this, took out water permits intended to cover all of the flood waters of the stream and such additional waters as they might obtain through means of the water permits. The company also provided for obtaining a small amount of water from other small streams by means of a gathering system (p. 245), bringing the waters of these streams into the reservoir. This gathering system in some years

brought no water at all. In others, it brought a small amount (p. 71). Trapper Creek is a stream coming into Goose Creek above the irrigated area in Idaho and its waters, so far as the old settlers were concerned, were counted as part of Goose Creek. Birch and Cottonwood Creeks are on the gathering system.

The claim of the Oakley Company therefore to the waters of the stream was the claim to all of the old rights held by the original settlers and also to such additional rights as were obtained by means of the later water permits issued by the State Engineer of Idaho.

The claims of the appellants, who were the defendants in the action, were the claims to certain old rights used upon the stock ranches above mentioned. These stock ranches in the early days were occasionally overflowed by high water. Dams were sometimes placed in the stream to facilitate this purpose (pp. 102, 156.) Occasionally some canals were built. The whole system, however, was very crude, being intended, except in a very small part, only to moisten the ground sufficiently for the purpose of stimulating the growth of the native grass. The work done for irrigation on these ranches was typical of the work ordinarily done on the big cattle ranches in the early days for the purpose of "holding the water," little attention being given to the real utility of the works or to cultivating anything but native grass.

After the construction of the Oakley Company's irrigation project and the considerable enhancement in value of the Vineyard Company's property thereby, appellants actively commenced the construction of new ditches and the use of an additional water supply. This condition necessitated the bringing of this suit by the Oakley Company.

In the decree in the lower court there was given to the Oakley Company the rights claimed by the old settlers and such additional rights as they had procured by virtue of the permits, and the Court also gave to the Vineyard Company certain old rights which it claimed, various priorities being given to the various rights according to the testimony before the Court.

The grounds of this appeal, stated in their order of importance, are as follows:

1. The claim on the part of the appellant that the Court erred with respect to the water rights awarded to the plaintiffs under grants from private individuals, being the rights mentioned in paragraph (a) of the decree (p. 284.) These are what are known as the old rights, that is, the rights held by the original settlers and which were transferred to the Oakley Company.

2. That the Court erred in decreeing to the plaintiffs any of the waters of Goose Creek with the exception of about 30,000 acre feet to which the plaintiffs would be entitled under the permits issued by the State Engineer.

3. That the Court erred with respect to the quantities of water awarded to the Vineyard Company and with respect to the dates of priority thereof.

4. That the Court erred in granting plaintiffs any relief as against the defendant, the Utah Construction Company, of which the Vineyard Company is a subsidiary.

We will take up these points in the order above given.

ARGUMENT.

As before stated, the water rights which were claimed by the plaintiffs in the court below were of two kinds.

1. The rights which they obtained by transfer from the old settlers.

2. The rights which they obtained later by virtue of water permits issued by the State Engineer of the State of Idaho.

The appellants claim that the Court erred in respect to the water rights awarded to the Oakley Company under grants from the old settlers. The statement of reasons upon this point in the appellants' brief is as follows:

> "Plaintiffs claim rights under purchase from former appropriators of water aggregating 300 second feet. From the nature of the proof offered by them in support of the allegations of the bill with respect to these rights, it will be seen that if they were the owners in fact of any of these early rights they acquired the same under deeds from individual grantors. The nec-

> essities of the case were such, therefore, that it was incumbent upon plaintiffs to prove, first, the existence of each of said rights, and second, a conveyance thereof to plaintiffs" (p. 21, brief).

We admit, of course, that it was necessary to prove the existence of the rights and we also admit that if we claimed the rights of the old settlers that it would be necessary for us in some way to connect ourselves with them. In this respect a somewhat curious misunderstanding seems to have arisen in the mind of the chief counsel for the appellants at the argument in the court below and also on this appeal. Prior to the hearing of the case in the court below the question was discussed with Mr. Boyd, one of the counsel for appellants, as to the course to be pursued by the respective parties in regard to making proofs relating to their early day water rights. The appellants were the successors in interest of a number of old time cattle companies which had operated in this section (p. 100). It would take considerable time to show the chain of title to the land and rights to the waters which they claimed. The appellees were in a similar position. They were the successors of a large number of individuals who had initiated rights as early as 1875. From that date onward there were a large number of transfers covering the lands and water rights in the valley in Idaho. It would have taken many days to have introduced the proof showing the ownership of the

land and the ownership of the water rights. The Vineyard Company owned the land and water rights in certain mountain valleys in Nevada. The Oakley Company owned an irrigation system serving lands owned by its stockholders in Idaho. There was no real dispute about this. The only dispute was as to the amount of their water rights and their priority.

With this situation an agreement was reached whereby it would be unnecessary to show these transfers, it being agreed that each company was the owner of the rights in the respective States, that is to say, the Vineyard Company owned the rights in Nevada and the Oakley Company in Idaho. Believing that this was the understanding of both parties, the appellees started in to show the history of the Idaho water rights (p. 73 et seq). Somewhat to our surprise we were met by a series of objections by the counsel in charge of the trial, Mr. Nebeker, which, at the time, we did not thoroughly understand in view of what we believed to be the prior arrangement. After a considerable colloquy, the following statement was made:

> "Mr. Hays: Mr. Nebeker, as I understand it, our stipulation is to this effect; that we are the successors in interest of whatever rights those people had under that decree. (This was an early water right decree in the State court of Idaho to which the Idaho claimants were parties).
>
> "Mr. Nebeker: That is my understanding yet.

"Mr. Hays: So that we may confine our proof to the rights themselves?

"Mr. Nebeker: To the rights themselves.

"Mr. Boyd: In other words, that we are the owners of whatever rights we have on our side and that you are the owners of whatever rights these people may have had on your side." (This referred to the early-day settlers).

This being the understanding, the colloquy closed and the effect was this: The appellants were not required to show location notices or water permits in the State of Nevada, nor were they required to show any transfers by deed. They contented themselves with showing the use of water on the Nevada lands and the date and extent of such use. They accepted the benefits of the stipulation. On our part, we did likewise. We sought to show the history of the use of water on the lands in the vicinity of Oakley, the extent of such use, and the time when such use was initiated. We did not show deeds from each individual settler, but, in accordance with what we understood to be the prior arrangement, we presented for the inspection of the appellant and introduced in evidence an itemized list of the parties who had made conveyances to us of their water rights totalling 8,890 inches. This list is marked Exhibit No. 11, (pp. 81, 82). In addition to this, the form of deed used in making these conveyances was also introduced, (p. 256). Copies of the early water decrees were likewise introduced in evidence although these decrees were only among the Idaho users, (p. 77,

78. We did not claim that these decrees were in themselves such an adjudication against the appellants as they would have been if the appellants had been parties to the suit. They were offered as a part of the history of the old time irrigation conditions so far as it affected Idaho lands. Under the stipulation it was not necessary for us to show any conveyance of water rights to us from any party. We made no showing of conveyances because we understood that it was not required under the stipulation. The construction of the stipulation which we contend for was agreed to by the lower court and was acted upon by both parties at the trial.

With regard to the use of water under these old rights, the proof was to the effect that in the year 1888 about 12,000 acres were patented; that 6,500 acres of land were irrigated (p. 87); that the water supply was scant even for this area (p. 87); that water was delivered that year into all of the ditches and that the deliveries took all of the water supply in the stream (87, 88). It was further shown that the same general condition existed from 1888 on down to the time of the building of the Oakley Company's works, (p. 88).

In regard to the condition of the rights prior to 1888, so much time had elapsed that it was impossible to find witnesses who knew the facts in detail, but we were able to show in a general way the beginning of the settlement of the country and its growth down to 1888, and the use of water during

that period, (p. 77). The decrees also illustrated the manner in which the water supply had been handled as among the Idaho people. Under circumstances such as these, rules of evidence shape themselves to the proof of the facts according to circumstances. Rules which apply to facts as ancient as those in this case are of necessity relaxed from the rules applying to recent transactions.

Chamberlain on Evidence, Sec. 2960 (Vol. IV).

Ancient documents are allowed to support ancient possession.

Wigmore on Evidence, Sec. 157.
Rice on Evidence, Sec. 216.

In this case, applying the rules stated by the authors above mentioned, the water right decrees in the suits between the parties in Idaho were evidence of their rights among themselves and of the extent, manner and method of distribution of the water supply as between them. It was an ancient adjudication, understood and acquiesced in for many years. It did not constitute an adjudication as against the Vineyard Company in Nevada in the sense that it would if it had been a party to the suit, but it was one of the items of evidence which might properly be introduced in a historical way to show the use of the water on the lands in Idaho, the method, amount and nature of distribution thereof. There

appears to have been no objection by any one to the method of distribution of the water supply under these decrees, certainly not by the Vineyard Company or its predecessors in interest. Our right to the old water rights held by the old settlers was shown by our showing the use of water which was made by the people of that community, the time of use and the amount thereof, it being conceded by the stipulation that we were the owners of the rights on our side of the State line.

From 1888 onwards, for many years, and down to the time of the completion of the Oakley works, the settlers on the Idaho lands used the entire flow of the stream, amounting on the average at the highest flow to 202 second feet or upwards of 10,000 inches of water. The decree in the Idaho State Court rendered in 1892 covers 10,435 inches of water. In some cases, in that decree, the period of use of water is limited. (pp. 269, 273). To illustrate, in one instance, the right of J. E. Miller to 620 inches was limited to a time between the first day of January and the 20th day of March of each year, (p. 273). This decree, in attempting to conform to the flow of the stream, provided for the taking of the flood waters during the late winter and early spring. The use of the water was at the rate of one inch to the acre and was so distributed under the decrees (pp. 164, 259). The average high water was 200 second feet, but of course at many times the water was higher than this for short intervals. Later on in

the season also, it dropped down to a low point, there being on an average only 53 second feet of water or 2,700 inches in the stream in the month of July for the irrigation of the 6,500 acres commonly irrigated (p. 99). It was sought to cover the water supply of the old settlers as completely as possible considering the nature of the flow of the stream. Deeds were taken for water amounting to 8,890 inches (p. 88), out of a total of 10,435 inches mentioned in the decree. The amount of unpurchased water represented occasional possibilities so far as the water supply was concerned and as it was considered that these had probably lapsed for non-use, water permits were taken out in the State Engineer's office to cover any water not represented by the conveyances made to the company by the old settlers. The unpurchased rights represented only occasional winter flood rights.

Appellants, in discussing the question of the old rights, go on further to say (p. 39 brief):

> "Assuming that the court did not err in the particulars we have been discussing (in regard to the old rights), it did err we think as to the quantities of water granted under the so-called old rights and also erred with respect to the dates thereof."

Appellants then go on to discuss the area which was under cultivation and irrigation in Idaho, beginning with the year 1878 and running down to

the year 1888. Appellees having shown by the testimony that 12,000 acres of land had been patented by the settlers, that 6,500 acres were ordinarily irrigated, that this, in 1888, took the entire supply of the water, that all the ditches were then built and that water was used in all of them and that the conditions existed substantially without change from 1888 to 1908, we may properly look to see what the conditions were prior to 1888 (pp. 87, 88, 89, 164, 188, 192).

The settlement of the valley commenced in 1875, forty years before the trial of the case. All the early-day water rights were initiated more than twenty-five years before the trial. To find living witnesses who could testify to the facts at that early day is obviously almost out of the question. We may, therefore, look to the decrees which were rendered among the parties in that locality for information in regard to the priorities among them in addition to the oral testimony which was introduced.

We append the following table showing, first, the water rights granted in the first decree rendered in the year 1886 in the State court between some of the parties living in the valley in Idaho; also the priorities granted by the second decree, which included many more parties and comprehensively covered the entire Idaho situation. We next show the number of acres which the lower court found was irrigated in various years in this case, and this, translated into terms of inches, would give the amount of

water which the Court found they would be entitled to under the former conditions prior to the building of the new works:

Year.	Decree, 1886.	Decree, 1892	Decree of U. S. Court
1875	160	160	
1876	320	320	
1877	170	710	
1878		320	300
1879	320	320	100
1880	1,040	1,340	250
1881	2,680	2,625	850
1882	2,640	3,390	500
1883		100	3,000
1884	200	200	1,500
1885	620		
1886			
1887		180	
1888		150	
	8,150	10,315	6,500

The total amount of water rights acquired by deed by the Oakley Company amounted to 8,890 inches or 179 second feet (p. 88).

The early use of water and the early necessity for such use was an inch to the acre and this amount was given in the decrees. The testimony given in the court below shows that this amount was necessary (p. 196). This amount was the right to a continuous flow of an inch to the acre so long as it was found in the stream. The lower court did not

give us this right to which we were entitled under the evidence. The Court found that we had rights covering 6,500 acres (p. 279), but instead of giving us the right to which the evidence showed we were entitled, the Court limited the right during the season to 2 3-4 acre feet per acre. We think the Court was not justified in so limiting our right, particularly as the Court gave to the other side three acre feet for its hay and grain land (p. 283). This error of the Court against us abbreviated our old water rights. It cut them below the allowance which the Idaho court had given, but we find it set up in the brief of the appellants (p. 41 of brief) as an error against the appellants, when as a matter of fact it was a limitation on our right and an error against us. Under the new system of distribution of the water supply provided for under the new works, the settlers were entitled to 1 1-2 acre feet of water delivered within one-half mile of their headgate. It would take, of course, a very much larger amount delivered at the intake into the reservoir or at the point of diversion therefrom. The specific rights which the plaintiffs and appellees were entitled to were the rights to the flow of the stream to the extent of an inch to the acre continuously whenever such an amount could be found in the stream, the right being limited to 8,890 inches, the amount represented by the purchases of water rights made by appellees. In addition to this, we were entitled to divert the number of second feet provided for in the

water permits, subject, however, to any prior rights of the appellants. We did not go into the detail of canal losses in order to show just what amount of water it was necessary to divert in order to give 1 1-2 acre feet to the farmer measured at a point within one-half mile of the place of intended use (p. 34) for the reason that we had built works covering 50,000 acres of land (p. 71) and were entitled to divert water to cover this land under our contract with the State and under the agreement made between the State and the United States and under our contract with the settlers. As the flow of the stream had never exceeded 78,000 acre feet, it seemed unnecessary to go into those details because the total supply was obviously insufficient for the project as constructed. The old settlers were entitled from the year 1888 onwards to 6,500 inches of water whenever they could find it in the stream subject to small priorities on the part of the appellants. This right had been taken away from them by the decree of the Court and they are limited in the aggregate to 2 3-4 acre feet.

Much money has been spent in providing a reservoir to conserve the rights of the old settlers in order that these water rights might be better distributed in the time of year when the greatest use of water was required. The limitation cutting them down to 2 3-4 acre feet per acre is a serious abbreviation of the right to which they were already entitled. The limitation as to 2 3-4 acre feet is an

error against the appellees and not against the appellants. The duty of 1 1-2 acre feet per acre was provided under the new plan for an area of 50,000 acres, the water to be delivered at a point within one-half mile of the place of intended use, but this is of course not the same amount that would need to be diverted from the stream in order to make such a delivery nor is it the amount which would run into the reservoir. Seepage losses in reservoirs and canals vary from a minimum of twenty-five per cent up to fifty per cent or more, but we did not go into this phase of the matter on account of the obvious insufficiency of the water supply to cover the entire tract for which the works were built. It would be an excellent system indeed that could deliver to the settler at the half mile point sixty-five per cent of the water that ran into the reservoir. From 1888 onward the old settlers had diverted all of the waters in the stream subject to some appropriations made by appellants and their rights should have been protected in the decree. They should have been given the entire flow of the stream up to 6,500 inches at all periods of time during the year; in other words, a continuous flow as provided in the Idaho decrees.

The real complaint in this case was not against the old diversions of the Vineyard Company or its predecessors in interest, but against the new works which were built and the new diversions made after the building of the Oakley Company's project.

As to the distribution of the appropriations

through the various years on the Idaho lands prior to 1888, the testimony of Mr. Howells and Mr. Parkinson shows the following facts:

There were 300 acres farmed in 1878. In 1879, the acreage was 400 acres. In 1880, it was increased to a total of 700 down to 1881, that is, from 1878 down to and including 1880, there were 700 acres (p. 87). In 1882, there were 1,500 acres. In 1883, there were 2,000 acres (p. 89). The ditches were the same in 1882-3 up to 1900. Two canals were taken out in 1883, the East Canal or Emerson Canal, and the West Canal. Reference to the decrees in the State court show that 2,000 inches were awarded to the East Canal and 1,000 inches to the West Canal. The location and capacity of the ditches were the same in 1909 (when the new area was contracted for) as in 1888. There was very little change in the area of irrigated lands from 1888 onward. The irrigation of 6,500 acres was about the same between 1888 and 1909 (p. 88). In 1888 and subsequent years many of the ditches were able to carry more water than there was in the stream (p. 88). The company took conveyances of 8890 inches so as to include flood waters (p. 88).

The Court evidently considered the testimony of Howells and Parkinson and others in order to determine the rate of use of water, it being shown that 6,500 acres were irrigated in 1888 and that this area had been brought to a state of irrigation by the growth and development of the country beginning in

1875. The Court, on account of the ancient character of the facts, might properly look to these decrees for the purpose of in some respect informing itself as to the rate of development which had taken place in the country. Whether this was done we do not know.

With regard to the rights of the appellees, the appellants object on the further ground that the Court erred in decreeing to the appellees any of the waters of Goose Creek in excess of 30,000 acre feet (p. 62). They base this assignment of error upon the ground that in the year 1915 there were only 20,000 acres of land in cultivation upon the Oakley Project and that one and one-half acre feet for each acre of this ground would amount to 30,000 acre feet. They ignore, however, the fact that the measurement of the one and one-half acre feet of water must be at a point within one-half mile of the place of intended use and not at the point of diversion from the stream or at the point of inflow into the reservoir.

They quote Section 4621 of the Revised Codes, as amended (Chap. 35, Laws of 1913), to the effect:

> "In allotting the waters of any stream by the District Court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied."

That has been done in this case, the allotment being made for irrigation purposes. The statute further goes on:

> "And when such water is used for irrigation, the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land which is irrigated but such water and such right will pass with the conveyance of such land and such decree shall describe the land to which such water shall become appurtenant."

This has been done in this case. The statute further provides:

> "The amount of water so allotted shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed; provided, that in the case of works capable of diverting more water than is applied to a beneficial purpose at the time the rights of the person or persons owning or using such works are adjudicated by the court, the right only to the water beneficially applied at the time of making such allotment shall be confirmed by the court and the court shall ascertain the amount of water which can be diverted through such works in excess of such quantity beneficially applied and shall set a time when such amount shall be applied to the beneficial purpose for which it is intended which time shall not exceed six years from the date of the decree issued by such court under such adjudication."

The situation is peculiar. The diversion works consisted of two canals having a diversion capacity a little in excess of 500 second feet (p. 71). The total discharge of Goose Creek and its tributaries above the reservoir (p. 99) has been as follows:

In 1911, 49,170 acre feet.

In 1912, 74,000 acre feet.

In 1913, 50,915 acre feet.

In 1914, 64,740 acre feet.

The capacity of the reservoir (p. 24) was 70,000 acre feet. The project covered 50,000 acres (p. 71) so that it would take 75,000 acre feet measured at a point not farther distant than one-half mile of each quarter section of land (p. 28) in order to satisfy the terms of the contract. It would take much more than 75,000 acre feet of water in the reservoir to supply the land on account of seepage losses and transportation. This was not gone into for the reason, as before stated, that the supply at the point of diversion was insufficient for the area of lands under the works. The entire water supply had already been turned in and used upon the smaller area of land that was cultivated each year.

In 1913, there were 11,590 acres in cultivation.

In 1914, 17,234, and the amount in 1915 was estimated at 20,000 or 21,000 (p. 72).

The statute of the State mentioned with regard to decrees in water right cases must be taken in consideration, however, with other statutes relating especially to Carey Act Projects. Under the Carey Act, a water right for the entire project is taken out at the time of the presentation of the plan to the State Board of Land Commissioners (Sec. 1617, R. .C). The statute provides that the land shall be entered by settlers in tracts not to exceed 160 acres (Sec. 0000, R. C.). It also provides that each settler shall be entitled to a proportionate interest in

the water right taken out for the project (Sec. 1615, R. C.). In addition to this, that a water right contract must be secured by each settler entitling them to this water supply before an entry of the land can be made (Sec. 1626, R. C.) and the water right is made appurtenant to the land. The settler is only required to cultivate one-eighth of his land in order to make final proof (Sec. 1628, R. C.). The settler is given three years after his settlement in which to make his final proof (Sec. 1628, R. C.). There is no provision of the statute specifying the period in which the Carey Act settlers must cultivate his entire area of land. Under the statute cited by appellants and above quoted, the right only to the water beneficially applied at the time of the making of the allotment is to be confirmed by the Court. Now, in this case, the works were too large for the stream. The canals would divert in excess of 500 second feet and the reservoir would impound 70,000 acre feet of water. The amount of water which the stream discharged varied from 49,170 acre feet in 1911 to 74,000 acre feet in 1912, but this water was used on the area which was in cultivation in those years, the seepage losses in new works and new reservoirs being large. All the water therefore in the stream was beneficially applied at the time of making the allotment and this varied in different years. While it is true that the works are capable of diverting more water than had been applied to beneficial use, still, all the water in the stream had been beneficially used upon

the project and there was no occasion for the Court to set a time when the excess amount of water which might be diverted in the system should be applied to beneficial purposes. If such a condition should arise, it would be covered, of course, by the statute. The seepage losses in new works are very great; they gradually decrease. Ultimately, the existing water supply will be stretched out over an additional acreage of land. Apparently it can never cover, however, the area of 50,000 acres originally jurisdiction so that it may make any changes of this character necessary to meet new conditions. The statute cited applies to cases where the works are built but at the time of the decree only part of the water is used. As to the remainder the further time provided by the statute is to be given. But that is not this case. This statute is modified by Laws 1915 p.

It is claimed by appellant that the Court erred with respect to the quantities of water awarded to the Vineyard Company and with respect to the dates to which said rights relate. The evidence upon this point was conflicting.

The testimony with regard to the area irrigated on the Grandee ranch may be summarized from the testimony of the witnesses as follows:

McClelland (1889), 428.2 acres (p. 106).

Gamble (1889), 405 acres (p. 141-2).

Mortensen (1913), 300 acres (p. 130-2).

Martin (1912), 180 to 250 acres (p. 153).

Boren, 260 to 270 acres.

The above statements relate to different periods of time as will be found by reference to the testimony running all the way from 1889 down to 1909.

The testimony on the Winecup Ranch may be summarized as follows:

McClelland (1889), 269.2 acres (p. 124).

Way (1915), 451.2 acres (p. 126-7).

Gamble (1886), 120 acres (p. 142).

Mortensen (1913), 200 acres (p. 130).

Martin (1896-1912), 50 acres (p. 151).

Worthington (1894), 35 to 50 acres (p. 156).

Bedke (1899), 50 acres (p. 158).

The testimony o nthe Spring Creek Ranch may be summarized as follows:

Gamble (1904), 45 acres (p. 143).

Martin (1912), 10 acres (p. 152).

The rules applying to the use of water in cases of this kind seem to be well settled by the courts. In the first place, the use of water must be a reasonable use. In a case in the Federal Court of Nevada, it was said:

> "Under the principles of prior appropriation, the law was well settled that the right of water flowing in the public streams must be acquired by an actual appropriation of the water for a beneficial use; that if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use of the water."
>
> Union M. & M. Co. v. Dangberg, 81 Fed. 73.
>
> Dick v. Caldwell, 14 Nev. 167.
>
> Simpson v. Williams, 17 Nev. 432.

Ditches built for the holding of water rights are of no real value for that purpose, as was said in a Nevada case:

> "If the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purpose of irrigation, for watering his stock and for domestic purposes."
>
> Barnes v. Sabron, 10 Nev. 217.

The amount of water that a water user has been in the habit of applying to his lands is not the true test. The question to be determined is the amount actually necessary.

> Farmers Co-Operative Ditch Co. v. Riverside Irrigation District, 16 Ida. 525.

The witness Franklin (p. 178) says that, under the present condition of the lands, no method other than the flooding method could be used because they are in their natural condition.

In determining the duty of water, reference should always be had to lands that have been reduced to a reasonably good condition for irrigation.

> Farmers Co-Operative Ditch Co. v. Riverside Irrigation Co. 16 Ida. 525.

Under Section 4676 of the 1911 compilation of the laws of Nevada, the maximum quantity of water in localities where it cannot be used for a period of more than six months is three acre feet.

This has been the law of Nevada since 1903.

Laws Nevada, 1903, p. 24.

Under the Irrigation Laws of 1913, page 192, it is provided, under Section 4 of the act, that all water used in the State for beneficial purposes shall remain appurtenant to the place of use, provided, that if for any reason it should become impracticable to beneficially use the water at the place to which it is appurtenant, it may be transferred to some other place provided the rights of other persons are not affected.

Section 11 of this act provides that where water is diverted for direct irrigation not to exceed .01 of one cubic foot per second for each acre of land should be allowed.

It would therefore seem that the appellant has received in this case all that the law would permit and apparently something in excess thereof, for they have been permitted to divert water at a rate in excess of .01 of a second foot per acre.

It is some times said that a suit of this character is sui generis, being sometimes considered as an action in rem and sometimes as an action in personam.

Kinney on Irrigation, Sec. 1634.

The appellant claims that the Court erred with respect to the provisions of the decree intended to operate upon property and rights and to regulate the internal affairs of the appellant in a foreign

State. The right to maintain this suit is fully established by the decisions.

Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11.

Willey v. Decker, 11 Wyo. 496.

Taylor v. Hulett, 15 Ida. 255.

Anderson v. Bassman, 140 Fed. 14.

Rickey L. & C. Co. v. Miller & Lux, 218 U. S. 258.

A court of equity has power by its decree to reach the ends of justice and it may make such a decree in a water suit as will be productive of that result.

Union M. & M. Co. v. Dangberg, 81 Fed. 73 (p. 121).

Conrad Investment Co. v. United States, 161 Fed. 829.

Gutierrez v. Wege, 145 Cal. 730.

Simkins Federal Equity (3rd Ed.), p. 588 and cases there cited.

The measuring devices required by the Court were not alone for the information of the appellees, but were for the information of the appellants and the Court as well in order that there might be an orderly method of determining the amount of water used. The Court did not attempt to take undue liberty with the statutes of Nevada with regard to the distribution of the water.

Under Section 54 of the Nevada law (quoted on p. 79 of brief), it is the duty of the State Engineer

to follow and obey the decrees of the Court, but the Nevada statute does not do away with the right of the Court to provide reasonable and proper methods for the determination of the right to the use of water under a decree rendered by the Court. A decree in a water case which did not provide for an efficient method of handling the water supply and determining the amount used would have little value to any of the parties engaged in the litigation.

As to the point made that there should be no relief against the Utah Construction Company, we say that it appears that the Utah Construction Company was the owner of a large proportion of the stock of the Vineyard Company; in other words, the Vineyard Company is a subsidary of the Utah Construction Company which is in a position to control its conduct. While the Utah Construction Company might not have been a necessary party to the suit, still, it was a proper party and it should not be permitted to direct the doing of things by the Vineyard Company which that company under the decree is forbidden to do. Further than this, the decree does not go.

In conclusion, we submit that the errors committed by the Court below were errors against the appellees rather than against the appellants and that upon this appeal the judgment should be affirmed.

Respectfully submitted,

SAMUEL H. HAYS,
P. B. CARTER,
Solicitors for Appellees.